In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 77-69.

ALAN MACKEY,
REGISTRAR OF MOTOR VEHICLES OF THE
COMMONWEALTH OF MASSACHUSETTS,
APPELLANT,
v.
DONALD E. MONTRYM ET AL.,
APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.

Brief for the Appellant.

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Opinions Below.

A three-judge panel of the United States District Court for the District of Massachusetts has rendered two decisions in the present case.

The original 2-1 decision of the district court, declaring the Massachusetts implied consent statute unconstitutional and enjoining its enforcement, is reported at 429 F. Supp. 393 (D. Mass. 1977). The majority and dissenting opinions, dated March 25, 1977, are reproduced as Appendix A of the Jurisdictional Statement, at pages 1a-23a.

The subsequent 2-1 decision of the district court, denying the defendant Registrar's motion to reconsider its refusal to stay and to modify judgment, is reported at 438 F. Supp. 1157 (D. Mass. 1977). The majority and dissenting opinions, dated October 6, 1977, are reproduced in the Record Appendix at pages 78-93.

Jurisdiction.

The district court on April 4, 1977, entered partial summary judgment declaring the Massachusetts implied consent statute, M.G.L. c. 90, § 24(1)(f), unconstitutional (A. 55). On April 12, 1977, the defendant-appellant Registrar filed his notice of appeal to the United States Supreme Court (A. 4, 58). The Registrar filed his jurisdictional statement on July 12, 1977. This Court noted probable jurisdiction on April 17, 1978. The jurisdiction of the Court derives from 28 U.S.C. § 1253.

Statutory Provision Involved.

The validity of Massachusetts General Laws, c. 90, § 24(1)(f), is involved. That provision provides in full as follows.

Whoever operates a motor vehicle upon any way or in any place to which the public has right of access, or upon any way or in any place to which members of the public have access as invitees or licensees, shall be deemed to have consented to submit to a chemical test or analysis of his breath in the event that he is arrested for operating a motor vehicle while under the influence of intoxicating liquor. Such test shall be administered at the direction of a police officer, as defined in section one of chapter ninety C, having reasonable grounds to believe that the person arrested has been operating a motor vehicle upon any such way or place while under the influence of intoxicating liquor. If the person arrested refuses to submit to such test or analysis, after having been informed that his license or permit to operate motor vehicles or right to operate motor vehicles in the commonwealth shall be suspended for a period of ninety days for such refusal, no such test or analysis shall be made, but the police officer before whom such refusal was made shall immediately prepare a written report of such refusal. Such written report of refusal shall be endorsed by a third person who shall have witnessed such refusal. Each such report shall be made on a form approved by the registrar, and shall be sworn to under the penalties of perjury by the police officer before whom such refusal was made. Each such report shall set forth the grounds for the officer's belief that the person arrested had been driving a motor vehicle on any such way or place while under the influence of intoxicating liquor, and shall state that such person had refused to submit to such chemical test or analysis when requested by such police officer to do so. Each such report shall be endorsed by the police chief, as defined in section one of chapter ninety C, or by the person

> authorized by him and shall be sent forthwith to the registrar. Upon receipt of such report, the registrar shall suspend any license or permit to operate motor vehicles issued to such person under this chapter or the right of such person to operate motor vehicles in the commonwealth under section ten for a period of ninety days.

The text of the statute is presently located at page 95 of the 1978-1979 Cumulative Annual Pocket Part of Volume 11, Massachusetts General Laws Annotated (West Publishing Company, 1969).

Question Presented.

Whether a statute imposing a uniform temporary suspension of a driver's license for his refusal to take a chemical or breath analysis test upon arrest for drunken driving violates the Due Process Clause of the Fourteenth Amendment by providing a post-suspension hearing rather than a pre-suspension hearing at which the driver may dispute his refusal to take the test.

Statement of the Case.

Prior Proceedings.

On July 2, 1976, pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3), the plaintiff-appellee Donald Montrym

began in the United States District Court for the District of Massachusetts the present class action for declaratory and injunctive relief against enforcement by the Registrar of Motor Vehicles of the Massachusetts implied consent statute authorizing the suspension of a driver's license for refusal to take a chemical or breath analysis test upon arrest for drunken driving (A. 1, 6-12). On July 9, 1976, the Registrar assented to, and a single judge entered, a temporary restraining order against the suspension of Montrym's driver's license (A. 23). The restraining order has remained in effect throughout the litigation (*id.*).

In accordance with 28 U.S.C. §§ 2281 and 2284, as then effective, a three-judge court convened (A. 24). The Registrar filed an answer (A. 3, 25-27). Montrym filed motions for a preliminary injunction and for partial summary judgment of the unconstitutionality of the implied consent law.[1] The parties thereafter filed a stipulation of undisputed facts and relevant documents (A. 24, 28-52),[2] submitted memoranda of law (A. 3, 24) and on January 12, 1977, argued the merits of the motions to the three-judge court (A. 3).

On March 25, 1977, the three-judge panel rendered an opinion certifying the class action 429 F. Supp. 393, 400,

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[1] The motion appears to have been one for partial, rather than full, summary judgment because Montrym wished to pursue additional remedies of compensatory and punitive damages, as well as attorney's fees. Complaint, paragraphs 26, 27, 28 (A. 11-12).

[2] In its second decision, the district court majority stated its understanding that Montrym had never executed the stipulation of facts. 438 F. Supp. 1157, 1159 n. 1. Our examination of the original papers on file with the district court shows Montrym's counsel to have executed an original of the stipulation but not the additional copies filed for use by the panel members. This condition of the papers appears to have confused the panel. The dissenting judge correctly believed the stipulation to be in effect, just as Montrym's counsel represented to him during oral argument. 438 F. Supp. 1157, 1162 n. 1a.

and concluding that the statute violated the Due Process Clause of the Fourteenth Amendment. *Id.*, 398-400. On April 4, 1977, the majority of the panel entered partial summary judgment for Montrym (A. 4, 55). On April 12, at the Registrar's request (A. 4, 56), the majority entered a clarification of its judgment, expressly declaring the statute unconstitutional on its face and permanently enjoining the Registrar from its enforcement (A. 4, 57). Also on April 12, the Registrar filed in the district court his notice of appeal to the Supreme Court (A. 4, 58).[3]

On April 14, Montrym filed another proposed judgment to include the additional order that the Registrar return the suspended licenses of all members of the plaintiff class (A. 4). The majority of the district court entered it as a "final judgment" (A. 63-64). On May 13, the Registrar filed a notice of appeal from that judgment (A. 65). At the same time he filed a motion for stay of judgment and order pursuant to Supreme Court Rule 18 with a supporting affidavit (A. 66-74) and a motion for relief from judgment (A. 75-76). On May 24, the majority of the district court denied both motions (A. 67, 76). On June 1, the Registrar moved for reconsideration of his prior motions to stay judgment and to modify judgment on the basis of the newly decided *Dixon* v. *Love*, 431 U.S. 105 (May 16, 1977) (A. 77). On October 6, 1977, the district court, by 2-1 decision, denied the motion for reconsideration (A. 78-93).

Copies of the October 6 decision were forwarded to the Supreme Court but were not docketed. Consequently the

[3] From April 20 onward, the docket entries of the district court failed to reflect the papers filed by the parties, perhaps because on April 20 the district court clerk forwarded a certified copy of docket entries and pleadings to the Supreme Court and considered the case inactive. In all events, the parties filed, and the district court considered, a number of post-judgment motions included in the Appendix and discussed below.

Court on October 31 vacated the judgment of the district court and remanded the case to it for further consideration in light of *Dixon* v. *Love*. Thereafter the Registrar continued to abide by the original judgment, and the parties informed the Court of the district court's second decision. The Court on February 21, 1978, reinstated the judgment of the district court, restored the appeal to its docket, and invited supplemental briefs from the parties. After submission of briefs, the Court on April 17 noted probable jurisdiction.

Facts.

At approximately 8:15 p.m. on the evening of May 15, 1976, Donald E. Montrym, a licensed Massachusetts driver, was involved in a collision between his station wagon and a motorcycle (A. 28). The accident occurred upon a public way in the town of Acton, Massachusetts. At about 8:30 p.m. an Acton police officer arrested Montrym and charged him with the offenses of operating under the influence of intoxicating liquor, driving to endanger, and failing to have his registration in his possession (A. 28). The police officer issued an appropriate citation (A. 28, 32), arrested Montrym, and escorted him to the station house.

Upon arrival Montrym refused to take a breathalyzer test.[4] Massachusetts General Laws c. 90, § 24(1)(f), pre-

[4] In the district court Montrym alleged that police did not inform him of the mandatory 90-day license suspension for refusal of the test (A. 7). Two police officers signed under penalties of perjury a contemporaneous report of Montrym's refusal despite prior notice of the suspension penalty (A. 40-41). In the course of its decision, the lower court treated that factual question as unsettled, 429 F. Supp. 393, 395, and did not involve it in the rationale for invalidation of the statute. Thus we assume that the court regarded the provision as unconstitutional even with a proper warning to an arrested driver.

scribes the following police procedure in the administration of the breathalyzer test. First, police must inform a driver arrested for operating under the influence of intoxicating liquor of the 90-day license suspension imposed for refusal of the test. The police officer receiving the refusal must then immediately prepare a written Report of Refusal to Submit to a Chemical Test. The Report of Refusal must state (1) the grounds for the officer's belief that the arrestee had been driving under the influence, (2) the fact of the arrest, and (3) the refusal of the test. The Report must be sworn to under the penalties of perjury by the police officer receiving the refusal. It must be endorsed by a witness to the refusal. And it must be further endorsed by the appropriate police chief or designated superior officer. The police must then send the Report "forthwith" to the Registrar who upon receipt must suspend the driver's license.

In the case of Montrym, the police described the grounds for their belief that he was driving under the influence: "A strong odor of an alcoholic beverage emitted from his person, he was glassy eyed and unsteady on his feet and he had to hold onto the [street] marker to maintain his balance, also spoke in a slurred fashion" (A. 41). Their Report also recounted that Montrym had been informed of the 90-day license suspension for refusal and that he had nonetheless declined the test at 8:45 p.m. (A. 41). As required by the challenged statute, the officer offering the test and a witnessing officer signed the Report under penalties of perjury and a superior officer endorsed it (A. 41). In compliance with the statute, the police administered no test

and forwarded the Report of Refusal to the Registrar (see A. 16-17, 29).

Further events at the station house on the evening of arrest have not been reduced to a stipulation or finding of fact.[5] Montrym submitted an affidavit in subsequent state court proceedings and filed a copy of it in the district court. In it he acknowledged a refusal of the test for reason of his unawareness of the automatic license suspension (A. 38-39). He recited further that his attorney had arrived at the station at approximately 9:05 p.m. and had advised him to take the test (A. 39); that he had then requested the test (A. 39); but that the police had thereafter refused to administer it (A. 39).

On June 2, 1976, the appropriate Massachusetts district court held a hearing on the criminal complaint charging Montrym with operating under the influence of intoxicating liquor, driving to endanger, and failing to have his registration in his possession (A. 28, 34-35). The state court found Montrym guilty of nonpossession of his registration, and not guilty of the charge of driving to endanger (A. 28). That court dismissed the charge of driving under the influence and as grounds cited Montrym's affidavit account of the police refusal to administer the breathalyzer after he had changed his mind upon advice of counsel (A. 28, 33).

On May 25 the Registrar had received the Report of Refusal (A. 29) and on June 7 he notified Montrym of the suspension of his license (A. 29, 42, 44-45). On that day Montrym's attorney wrote to the Massachusetts Board of Appeal on Motor Vehicle Liability Policies and Bonds

[5] The district court acknowledged the uncertainty of the facts beyond that point and did not consider them in its decision. 429 F. Supp. 393, 395.

(Board of Appeal) to request a hearing in appeal from the license suspension (A. 29).[6]

Montrym surrendered his license to the Registrar on June 8 (A. 29). At the time of surrender he had available an immediate statutory[7] hearing at which he was entitled

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[6] All persons aggrieved by an action of the Registrar may appeal within 10 days to that Board and receive a *de novo* evidentiary hearing. However, an appeal may not operate to stay any action of the Registrar (A. 30).

The governing statute, Massachusetts General Laws, c. 90, § 28, provides in full as follows:

> Any person aggrieved by a ruling or decision of the registrar may, within ten days thereafter, appeal from such ruling or decision to the board of appeal on motor vehicle liability policies and bonds created by section eight A of chapter twenty-six, which board may, after a hearing, order such ruling or decision to be affirmed, modified or annulled; but no such appeal shall operate to stay any ruling or decision of the registrar. In the administration of the laws and regulations relative to motor vehicles, the registrar, or any person by him authorized, may summon witnesses in behalf of the commonwealth and may administer oaths and take testimony. The board or the registrar may also cause depositions to be taken, and may order the production of books, papers, agreements and documents. Any person who swears or affirms falsely in regard to any matter or thing respecting which an oath or affirmation is required by the board or the registrar or by this chapter shall be deemed guilty of perjury. The fees for the attendance and travel of witnesses shall be the same as for witnesses in civil actions before the courts, and shall be paid by the commonwealth upon the certificate of the registrar filed with the comptroller. The supreme judicial or superior court may, upon the application of the board or the registrar, enforce all lawful orders of the board or the registrar under this section.

[7] Massachusetts General Laws, c. 90, § 24(1)(g), operating in conjunction with the challenged statute, provides in full as follows:

> Any person whose license, permit or right to operate has been suspended under paragraph (*f*) shall be entitled to a hearing before the

to representation by counsel and at which he could challenge the facial sufficiency of the Report of Refusal and its factual statements of probable cause, arrest, and refusal. Upon the request of a licensee, a Registry hearing officer will adjourn the hearing to permit police officers or other witnesses to be brought in for questioning, or for the submission of affidavits and counter affidavits, or for his own interview of witnesses in the field (A. 30). At the hearing the presiding officer, the licensee, and the licensee's attorney may question witnesses (A. 30). A licensee receiving an adverse decision may appeal to the Board of Appeal (A. 30).

Montrym did not use this hearing process at the time of license surrender on June 8. Instead, he pursued his June 7 request to the Board of Appeal for a hearing upon the initial suspension (A. 29, 46-47). On June 24 the Board notified him that he would receive a full hearing on July 6 (A. 30, 49). On July 2 Montrym commenced the present action, and then forwent the hearing before the Board of Appeal (A. 1, 30). On July 9 the Registrar assented to the temporary restraining order of the district court reinstating Montrym's license (A. 23). The parties then proceeded to litigate the general validity of the implied consent statute.

> registrar which shall be limited to the following issues: (1) did the police officer have reasonable grounds to believe that such person had been operating a motor vehicle while under the influence of intoxicating liquor upon any way or in any place to which the public has a right of access or upon any way or in any place to which members of the public have a right of access as invitees or licensees, (2) was such person placed under arrest, and (3) did such person refuse to submit to such test or analysis. If, after such hearing, the registrar finds on any one of the said issues in the negative, the registrar shall reinstate such license, permit or right to operate.

Summary of Argument.

The Massachusetts implied consent law, M.G.L. c. 90, § 24(1)(*f*), plays a crucial part in the Commonwealth's legislative scheme to deter, identify, reform and punish drunken drivers. That provision induces motorists arrested for driving under the influence of intoxicating liquor to submit to a chemical test by imposition of a mandatory 90-day license suspension for refusal of the test. The blood or breath test yields objective and usually conclusive evidence incriminating or exculpating the suspected motorist. According to his prior record, a convicted driver may face a variety of punitive and rehabilitative sanctions. These include a fine, brief confinement, and more typically a license revocation of at least one year for a first-time offender or at least five years for a prior offender. In the alternative, local courts retain discretion to place first-time offenders on probation on condition of their treatment in driver alcohol education programs or more basic alcohol rehabilitation programs. The prior consent process generates the evidence essential to trigger this entire remedial scheme of deterrence, punishment, and therapy (pp. 13-18).

The Massachusetts law satisfies the due process standards for a prior hearing opportunity announced by the Court in *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976), and applied in *Dixon* v. *Love*, 431 U.S. 105, 112-115 (1977). First, the private interest in an individual driver's license deprived by government action is not so substantial as to command a prior evidentiary hearing (pp. 19-25). Second, the risk of an erroneous deprivation of the license is minimized by Massachusetts procedures of (1) an evidentiary hearing commencing on the same day as the surrender of the license, and (2) a reasonably prompt subsequent *de*

novo hearing before an administrative board of appeal (pp. 25-30). Third, the countervailing public purpose is compelling: the prevention of death, injury and damage upon the public highways; and the efficient and accurate administration of highway laws in both its courts and Registry of Motor Vehicles (pp. 30-35).

Argument.

I. Introduction: The Massachusetts Implied Consent Provision is an Important Element of a Comprehensive Legislative Scheme to Deter, Correct and Punish Intoxicated Driving.

It is helpful at the outset to place the challenged statute in the full perspective of Massachusetts legislation governing intoxicated driving upon its public highways. In the exercise of this traditional police power, the Legislature has constructed a network of deterrent, rehabilitative, and punitive sanctions to identify and to remove the drunken driver from the roads. That scheme respects the individual's need for a driving license, his possible problem of dependence upon alcohol, and the public's right to safety. For its administration, the Legislature has vested the state courts with broad discretion for the application of separate or combined sanctions to the circumstances of individual cases. We shall briefly describe this overall program and the integral function of the breathalyzer test within it. We shall then turn to due process analysis of the implied consent provision under the light of the governing case law.

A. *Deterrent and Punitive Provisions.*

Massachusetts law creates and punishes the crime of driving under the influence of intoxicating liquor by a fine of not less than $35 nor more than $1,000; or by imprisonment for not less than two weeks nor more than two years; or by both such fine and imprisonment. Massachusetts General Laws, c. 90, § 24(1)(a).[8] In addition, a court must immediately report a conviction of driving under the influence to the Registrar, who, in turn, must immediately revoke the convicted driver's license. No appeal or motion for new trial may stay the revocation. M.G.L. c. 90, § 24(1)(b).[9]

The duration of the automatic revocation will vary according to the driver's history. If a driver has not experienced a previous conviction for operating under the influence of liquor or other proscribed substances during the preceding six years, the revocation will last at least one year. If the driver has incurred such a conviction during the preceding six years, the revocation must run for at least five years. Finally, if the Registrar determines, upon investigation and hearing, that the convicted driver caused an accident resulting in a fatality, the revocation must last for at least 10 years. M.G.L. c. 90, § 24 (1)(c).[10]

In the prosecution of the charge of driving under the influence, evidence of percentage, by weight, of alcohol in the defendant's blood at the time of the alleged offense, as shown by chemical test or analysis of his blood or as indicated by a clinical test or analysis of his breath, is admissible as evidence of intoxication. Evidence of refusal

[8] M.G.L. c. 90, § 24(1)(a), is reproduced as Appendix A hereto.

[9] M.G.L. c. 90, § 24(1)(b), is reproduced as Appendix B hereto.

[10] M.G.L. c. 90, § 24(1)(c), is reproduced as Appendix C hereto.

to submit to a test is not admissible in any civil or criminal proceeding against the driver. If the test shows a percentage of five one-hundredths or less, the presumption arises that the defendant was not under the influence of intoxicating liquor, and he must be released from custody immediately. If the test shows a percentage of more than five one-hundredths but less than ten one-hundredths, no presumption arises. And, if the test shows a percentage of ten one-hundredths or more, a presumption will arise that the driver was operating under the influence of intoxicating liquor. M.G.L. c. 90, § 24(1)(e).[11]

To induce arrested drivers to submit to the breath or blood test, the implied consent measure itself imposes the automatic 90-day license suspension as a sanction against refusal. M.G.L. c. 90, § 24(1)(f). Integrally with that provision, the succeeding section provides for any driver refusing the test a hearing before the Registrar on the issues (1) whether the police had reasonable grounds for arrest for operating under the influence; (2) whether the driver was placed under arrest; and (3) whether he refused the test. If, after such a hearing, the Registrar finds any one of these issues in the negative, he must reinstate the license. M.G.L. c. 90, § 24(1)(g).[12] This "same day" hearing begins at the time of the driver's delivery of his license to the Registrar. The driver may have the assistance of counsel. The Registry hearing officer will continue the hearing at the request of the driver in order to bring in police officers or other witnesses for questioning, to receive affidavits, and to interview witnesses in the field (A. 30).

[11] M.G.L. c. 90, § 24(1)(e), is reproduced as Appendix D hereto.

[12] M.G.L. c. 90, § 24(1)(g), is fully set out in note 7, *supra*.

B. *Rehabilitative Provisions.*

In 1974 and 1975 the Legislature supplemented these traditional measures with alternate corrective programs for drivers convicted of operating under the influence. It conferred discretion upon the state trial courts to place a convicted driver on probation for one year on condition of his voluntary enrollment in an alcoholic treatment or rehabilitative program, or both. M.G.L. c. 90, § 24D.[13] The courts retained discretion to order such probation in addition to the traditional penalties and in addition to any conditions imposed for a suspended sentence. To qualify for probation, a convicted driver must cooperate in an investigation of his case by the court probation staff. The staff must file a pre-disposition report of the case with the judge. It will include a copy of the operator's driving record and any recommendations of the Registrar concerning early reinstatement of his license. After disposition, a supervising court probation officer must maintain a current written report to include the driver's participation in a prescribed treatment or rehabilitative program and his ongoing drinking and driving behavior. Of the two classes of programs, the Division of Alcoholism within the Massachusetts Department of Public Health administers the driver alcohol education programs; and either public or private institutions may administer the more basic alcohol treatment and rehabilitative programs.

Finally, a state court after a trial upon the charge of driving under the influence may, in its discretion, continue a case without a finding of guilt and place a driver on one-year probation if he cooperates in an investigation of his drinking problem and consents to participate in a driver

[13] M.G.L. c. 90, § 24D, is reproduced as Appendix E hereto.

alcohol education program or alcohol treatment program. M.G.L. c. 90, § 24E.[14] If the court continues a case without a finding, it must hold a hearing between 60 and 90 days later to review the driver's performance in the assigned program and to consider dismissal of the charge. A probation officer must submit a written report including an evaluation by the assigned program's supervisor. And the Registrar must submit a report of the driver's interim driving record. If the court is satisfied of the driver's completion of, or compliance with the program, it may dismiss the charge or it may order a later hearing. At the same time, the supervising probation officer must file with the court a written report of a driver's unsatisfactory compliance with an assigned program or of driving behavior constituting a threat to the public safety. The court must hold an immediate hearing on the report. If it finds noncompliance with an assigned program or conduct threatening the public safety, it must order license revocation forthwith and so notify the Registrar. The revocation will last for at least the remainder of the probation year. The driver must then reapply for a license.

The rehabilitative programs are now beginning to yield data evaluating their efficacy. In his first comprehensive report to the Governor and Legislature, the Massachusetts Director of the Division of Alcoholism, responsible for the administration of the Driver Alcohol Education Program, observed a substantially lower rate of recidivism among

[14] M.G.L. c. 90, § 24E, is reproduced as Appendix F hereto.

Operators whose driving under the influence has caused a death are not eligible for the described probation and license retention. *Id.*, first paragraph.

Program graduates.[15] Before implementation of the Driver Alcohol Education Program, the rate of recidivism for drunk driving offenses was approximately 20 per cent. For program graduates, the courts' probation offices have indicated a rate well under 10 per cent.[16] At the same time the drop-out rate from the Education Program has remained low, again under 10 per cent.[17] Further, the Director reported evidence that the Program experience had caused a marked reduction in drinking behavior among its graduates.[18]

The breath or blood test is pivotal for the success of both the punitive and the rehabilitative programs. Each set of processes is triggered by a conviction or, in the instance of a continuance without a finding and probation, the certain prospect of a conviction. In the overwhelming majority of cases, a conviction will turn upon the objective evidence of the breathalyzer test. Submission to the test has rested upon the prompt and automatic 90-day suspension for refusal. Until the decision below, Massachusetts law and the popular awareness of that law had assured a general acceptance of the test and the operation of the ensuing punitive and corrective programs.[19]

[15] E. Blacker, Ph.D., Director, Division of Alcoholism, Massachusetts Department of Public Health, *A Report to the Governor and the General Court on the Driver Alcohol Education Program* (April, 1978), 22.

[16] Office of the Commissioner of Probation, *Preliminary Report to the Division of Alcoholism, 1977* (as required by M.G.L. c. 90, § 24D, final paragraph).

[17] *Id.*

[18] E. Blacker, *supra* note 15 at 23, 24.

[19] In fiscal 1976, the Massachusetts courts processed 17,735 cases of operating under the influence of intoxicating liquor. Administrative Office of the Massachusetts District Courts, *Statistics for the District Courts of Massachusetts for the Year Ending June 30, 1976.* It is estimated that about 300 arrestees per month, or 3,600 per year, refuse the chemical test. See 438 F. Supp. 1157, 1165 (opinion of the dissenting judge). Approximately 80 per cent of arrestees, then, accepted the test.

II. The Massachusetts Implied Consent Law Satisfies Due Process Because it Supplies a Prompt and Adequate Hearing Opportunity to a Driver Disputing his Refusal of a Chemical Test.

The parties and the judges of the district court have waged the argument of the present case within the boundaries of the three general criteria for a prior hearing announced by the Court in *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976), and reaffirmed by it in *Dixon* v. *Love*, 431 U.S. 105, 112-113 (1977). When the government acts to deprive a person of a liberty or property interest,

> identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[20]

[20] Other decisions have suggested a possible fourth criterion: the adequacy of a subsequent hearing. See *Goss* v. *Lopez*, 419 U.S. 565, 582-583 (1975) (suspension of public school students); *Arnett* v. *Kennedy*, 416 U.S. 134, 157-158 (1974) (benefits of terminated government employees); *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600, 610 (1974) (reclamation of personal property sequestered *ex parte* by the selling creditor).

If the availability of a subsequent hearing is relevant in the setting of the deprivation of a driver's license, the "same day" hearing of M.G.L. c. 90, § 24(1)(g), and the subsequent de novo hearing before the Board of Appeal under M.G.L. c. 90, § 28, provide reasonably prompt alternate hearing opportunities and support the constitutionality of the Massachusetts implied consent provision.

Two decisions of this Court have received paramount attention. The first is *Bell* v. *Burson*, 402 U.S. 535 (1971), in which the Court held the Georgia Motor Vehicle Safety Responsibility Act to violate due process. The statute required the suspension of the driver's license of an uninsured motorist involved in an accident unless he posted security to cover the amount claimed by an aggrieved party. The statute provided for a pre-suspension hearing which excluded consideration of the motorist's fault or liability for the accident. The Court concluded that the elimination of this factor from the prior hearing violated due process.

The second decision is *Dixon* v. *Love*, 431 U.S. 105 (1977), in which the Court held the Illinois habitual offender law to comply with due process. That law empowered the Illinois Secretary of State to revoke or suspend the licenses of drivers "without preliminary hearing upon a showing by his records or other sufficient evidence" that a driver's conduct fell into any one of 18 enumerated categories, including one for drivers whose records showed a "lack of ability to exercise ordinary and reasonable care in the safe operation of a motor vehicle or disrespect for the traffic laws and the safety of other persons upon the highway." By regulation the Secretary had devised a point system calibrating the severity and number of traffic offenses with the appropriate length of suspension or revocation. He received records of convictions from the courts, computed the drivers' point totals, and summarily suspended or revoked habitual offenders' licenses at appropriate point levels. The statute provided a subsequent evidentiary hearing for motorists wishing to dispute facts other than the validity of the underlying convictions. This Court held that the denial of a pre-suspension or pre-revocation hearing for a driver did not violate due process.

The Massachusetts implied consent process of M.G.L. c. 90, § 24(1)(f), satisfies the general criteria of the *Mathews* decision and compares favorably with the particular facts of the *Bell* and *Dixon* cases. An important and distinctive feature of that process is the operation of the companion provision, M.G.L. c. 90, § 24(1)(g), guaranteeing an affected driver a Registry hearing to begin on the same day as license surrender (A. 30) on the issues of (1) probable cause, (2) arrest, and (3) refusal of the breathalyzer test, as prerequisite facts for a 90-day suspension. The present appeal presents the Court with the question whether states must go further, and extend a hearing, both prior and evidentiary, in the administration of their implied consent laws.[21]

A. *An Individual's Private Interest in a Driver's License is Not so Substantial as to Require Universally a Full Evidentiary Hearing Prior to its Suspension.*

Since the Court's decision of *Bell* v. *Burson*, 402 U.S. 535, 539 (1971), it has been settled that the individual's

[21] As of June, 1978, twelve other states enforce implied consent provisions for the suspension of a driver's license without a prior hearing. See Ala. Code Tit. 36, § 154 (Supp. 1973); Alaska Stat. § 28.35.031 (1975); Del. Code Tit. 21, § 2742 (1974); Idaho Rev. Code § 49-352 (1975) (covering licenses of nonresidents); Ind. Code Ann. Tit. 9, § 4-4.5-4 (1975); Me. Rev. Stat. Tit. 29, § 1312(2) (Supp. 1976); Miss. Code Ann. §§ 63-11-21 through 23 (1972); Mo. Ann. Stat. § 564.441; Mont. Rev. Code Ann. § 32.2142.1-2 (Supp. 1972); N.H. Rev. Stat. Ann. § 262-A:69-e (Supp. 1972); N.M. Stat. Ann. § 64-22-2.12 (1975); R.I. Gen. Laws Ann. § 31-27-2.1 (1974).

The state courts have had occasion to sustain four of these statutes against due process attack. See *Jones* v. *Schaffner*, 509 S.W. 2d 72 (Mo. 1974); *Daneault* v. *Clarke*, 113 N.H. 481 (1973); *In re McCain*, 84 N.M. 657 (1973); *Broughton* v. *Warren*, 281 A. 2d 625 (Del. Ch. 1971) (upholding automatic suspension upon conviction of other driving offenses). See also *Opinion of the Justices*, 255 A. 2d 643 (Me. 1969).

liberty or property interest in a driver's license is entitled to some form of due process protection. "Suspension of issued [driver's] licenses . . . involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment." *Id.* However, the timing and the scope of a necessary due process hearing can vary with the circumstances so long as it is "'appropriate to the nature of the case.'" *Id.*, 542, quoting from *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). In *Bell* the Court found a prior hearing necessary because the Georgia financial responsibility law premised license suspension upon a bare preexisting assumption of a driver's fault or liability for an accident. Under the Georgia law this predicate for the license suspension received absolutely no process or attention. Thus the Court insisted that an assumption of liability have some premise in fact established by a previous hearing. *Bell* v. *Burson*, 402 U.S. 535, 542 (1971). While the timing of the hearing must be prior, its scope could vary from an administrative probable cause determination to a *de novo* judicial proceeding. *Id.*, 543. It need not be a full evidentiary exercise.

In *Dixon* v. *Love*, 431 U.S. 105 (1977), the Court defined more generally the constitutional value of a driver's license. It compared the license interest to social security[22] and social insurance[23] payments and found it less than a matter of subsistence for the ordinary driver. *Id.*, 113. The Court also measured the value of the license by the impact of its loss upon those drivers specially dependent upon it for livelihood or hardship purposes. Under that standard it approved of

[22] Citing *Mathews* v. *Eldridge*, 424 U.S. 319 (1976).

[23] Citing *Goldberg* v. *Kelly*, 397 U.S. 254, 264 (1970).

the Illinois statutory provisions enabling a commercial driver to submit an affidavit or to request an administrative hearing in application for relief in the form of a limited permit to drive commercially only.[24] Similarly, a driver facing "undue hardship" from suspension or revocation could apply for a limited permit to drive between his residence and place of employment or within other proper limits.[25] It is significant that these Illinois provisions (1) make hardship relief available only *after* suspension, (2) place the burden of showing eligibility for relief upon the applicant, and (3) fail to guarantee any deadline for a hearing upon, or determination of, relief. The possible length of a wrongful deprivation is an important factor in assessing the impact of official action on the affected private interest. *Mathews* v. *Eldridge*, 424 U.S. 319, 341. In Illinois a hearing, once requested, need not be *scheduled* for up to 20 days after receipt of the request and then need only be set for a date as "early as practical."[26] As the Circuit Judge member of the three-judge panel pointed out in his dissent from the second decision below, these procedures may consume "some time" during which the driver is deprived of his license.[27] This delay did not offend due process. The Court concluded that "the nature of the private interest here is not so great as to require us 'to depart from the ordinary principle, established by our decisions, that something less than an evidentiary hearing is sufficient prior to adverse administrative action'" (citing *Mathews* v. *Eldridge*, 424 U.S. 319, 343). *Id.*, 431 U.S. 105, 113.

The same principle should govern the driver's license interest at stake in the operation of the Massachusetts implied

[24] 431 U.S. 105, 110 n. 7.

[25] *Id.*

[26] Ill. Rev. Stat. c. 95-1/2, § 2-118(a).

[27] 438 F. Supp. 1157, 1163 (1977).

consent process. First, this Court's characterization of the license interest in *Dixon* appears to have been a general one. It did not turn upon the hardship exemptions afforded by the Illinois scheme. What is more, due process doctrine takes shape from the general, and not the unusual, case. *Mathews* v. *Eldridge*, 424 U.S. 319, 344. The Court was not basing a constitutional assessment of the license interest upon the exceptional hardship case of the professional truck, bus, or taxi driver, but rather upon the usual suspension of an offending driver confronting inconvenience rather than hardship.[28]

Second, the Massachusetts procedures for challenging the license suspension are more inclusive and expeditious than those in *Dixon*. M.G.L. c. 90, § 24(1)(g). The companion procedural provision of the implied consent law provides anyone, not merely hardship applicants, with the opportunity for an immediate hearing on the issues of probable cause for arrest, arrest, and refusal of the test. The hearing can begin before a Registry hearing officer on the day of license surrender and can continue as necessary for the collection of evidence. The applicant may be represented by counsel. In addition to the "same day" hearing, a driver may choose to appeal his suspension directly to the Board of Appeal for a full *de novo* evidentiary proceeding, in accordance with M.G.L. c. 90, § 28.[29]

[28] In their second decision the majority of the district court tried to distinguish the treatment afforded the license interest by the Massachusetts implied consent law from that of the Illinois habitual offender law on the basis of the latter's hardship exemptions. "The opportunity for such relief was a controlling factor in the Court's [*Dixon*] decision." 438 F. Supp. 1157, 1159. This interpretation of the Court's language seems plainly wrong, as the dissenting judge demonstrates, 438 F. Supp. 1157, 1162-1164.

[29] See note 6, *supra*.

Montrym chose the Board of Appeal route, and his experience is some measure of the treatment of the license interest by this alternate subsequent evidentiary hearing system. He requested a hearing on June 7, 1976; surrendered his license on June 8; and on June 24 received a hearing date of July 6. Notably, however, he did not pursue his administrative remedy at the Board. This course would have brought him, as a typical claimant, a hearing date 16 days, and a hearing itself 28 days into his suspension. These figures compare favorably with the constitutionally acceptable Illinois scheme providing a hearing date within 20 days and a hearing as soon as practical thereafter, and for hardship claimants only.

In short, the district court's language, coupled with the greater safeguards afforded here as compared with *Dixon*, make plain that the majority below assigned the driver's license a measure of importance in clear contradiction of the *Dixon* calculus.

B. *The Massachusetts Procedure Safeguards Against the Risk of an Erroneous License Suspension.*

The challenged statute prescribes a number of steps to assure the accuracy of a police report of a driver's refusal of the breathalyzer test. Even before the statutory procedure comes into play, certain inherent probabilities militate against an unwarranted license suspension. Often an objective event brings the police to the driver. Here, for example, Montrym was involved in a collision (A. 28). This undisputed accident was the occasion for the arrival of the police. They did not sift him out of the general traffic and initially stop him upon arguable grounds. Second, police must arrest and transport a suspected drunken driver to the station house for administration of the test (A. 38-39). They

do not offer or execute the test at the scene or in the heat of the confrontation and arrest. The arrest and the trip are not casual duty, but a significant interruption of ordinary police patrol activities. They are not likely to be undertaken lightly or without probable cause.

At the station house the statutory requirements begin. In the presence of a witness, an officer must inform the driver of the penalty of a 90-day suspension for refusal of the breathalyzer test. Upon refusal, the officer must immediately execute a written Report of Refusal (A. 40-41). The Report must set out (1) the grounds for the officer's belief that the arrestee had been operating under the influence, (2) the fact of the arrest, and (3) the driver's refusal of the test. The specificity of the grounds should assure further reliability. In Montrym's case the arresting officer described the symptoms of intoxication:

> A strong odor of an alcoholic beverage emitted from his person, he was glassy eyed and unsteady on his feet and he had to hold onto the [street] marker to maintain his balance, also spoke in a slurred fashion (A. 41).

The witness to the refusal must endorse the Report. Both the officer receiving the refusal and the witness to it sign the Report under the penalties of perjury (A. 41). The police chief or a superior officer must endorse it. As the dissenting judge below stated, the refusal of the test is a "simple, objectively-ascertainable event."[30]

The majority of the district court regarded the risk of an erroneous license suspension as nonetheless significant because a suspension rests also upon the reasonableness of the

[30] 438 F. Supp. 1157, 1161.

grounds for arrest and upon the fact of the arrest. They concluded that such disputable issues required some kind of pre-suspension opportunity for response to police assertions, but not necessarily a full evidentiary hearing.[31] This reasoning is questionable in several respects. First, the statute makes simply the informed refusal of the test the ground for suspension. Its pertinent language provides:

> If the person arrested refuses to submit to such test or analysis, after having been informed that his license or permit to operate motor vehicles . . . shall be suspended for a period of ninety days for such refusal, no such test or analysis shall be made, but the police officer before whom such refusal was made shall immediately prepare a written report of such refusal. . . . Upon receipt of such report, the registrar shall suspend any license or permit to operate . . ..

Refusal alone may well be the basis for suspension on the ground that the evidence of the test is a valuable instrument for determination of the truth, both inculpatory and exculpatory. The objective general interest of both the state and the individual in such evidence may independently justify the threat of the license suspension. For example, Montrym has subsequently argued that the refusal of the police to give him a belated test denied him exculpatory evidence (A. 37).

[31] 429 F. Supp. 393, 398-399; 438 F. Supp. 1157, 1160-1161.
Consequently, the majority distinguished the likelihood of error in *Dixon* as less because the license sanctions there rested upon the *records* of facts previously adjudicated in the courts, and not upon the correctness of the facts themselves. 438 F. Supp. 1157, 1160-1161.

Even if the reasonableness and the fact of arrest are disputable bases of the license suspension, the district court majority are unrealistic in their general suggestion that some informal process short of an evidentiary hearing will satisfactorily resolve them. In their first decision the majority suggested that the "same day" hearing was acceptable in its scope but that it should be advanced from a contemporaneous to a prior opportunity to be heard because of the likelihood of delays, most probably in the collection of evidence.[32] So long as it came before suspension, the court was willing to approve "a minimal opportunity to be heard"[33] or "a chance to alert the Registrar to the possibility that suspension is unwarranted and would be unjust."[34] Perhaps out of recognition that a full prior evidentiary exercise would be onerous and would indefinitely postpone the suspension sanction, Montrym also has pressed for some mere opportunity to respond.[35] The utility of such an opportunity is

[32] 429 F. Supp. 393, 400.

[33] *Id.*

[34] 438 F. Supp. 1157, 1160.

[35] Supplemental Brief in Support of Appellee's Motion to Affirm, 8 n. 4:

> Montrym does not maintain that the Constitution requires a pre-suspension hearing before termination. His position is simply that Massachusetts must afford him "an *opportunity to respond* or to present his side of the story," *Goss* v. *Lopez*, 419 U.S. 565, 480, 583-584 [appellee's emphasis].

The dissenting judge's treatment of this argument is far more practical:

> Individuals such as plaintiff who wish to assert a factually disputed claim will gain nothing from a non-evidentiary hearing. All a non-evidentiary hearing prior to suspension would do is cure simple mix-ups. But this function is perfectly well accomplished by the non-evidentiary hearing which a licensee may obtain the day he surrenders his license. What Massachusetts now provides — the opportunity for a full hearing beginning the very day the driver hands in his license — seems to me to strike a reasonable balance between the individual's interests and those of the state. 438 F. Supp. 1157, 1164.

apparent for clear and correctible mistakes, such as clerical errors in the suspension papers. However, the "same day" hearing already functions for these purposes. For example, Montrym on the day of license surrender could have presented to a Registry hearing officer a certified copy of the state court's finding of the police denial of the test and its dismissal of the charge of operating under the influence (A. 33). But the utility of such a hearing is fictitious for such ultimate issues as the probable cause for arrest or a closely disputed question of refusal. And one may reasonably expect these issues to constitute the great majority of cases.[36]

The "same day" hearing includes the essentials of fairness for the occasion of the license surrender, including an unbiased tribunal, notice of the proposed action and of grounds, opportunity to present evidence and argument, and, perhaps most importantly, the assistance of counsel. See Friendly, "*Some Kind of Hearing*," 123 U. Pa. L. Rev. 1267, 1279-1291 (1975).

[36] As the dissenting judge observed below:

> To be sure, a driver might assert that the police had required the test after arresting him without cause. But it is hard to imagine a sober driver refusing to take the test whether or not there was cause for his arrest; if improperly arrested, he would take the test and sue for false arrest, not put his license in jeopardy. And if the licensee feels that he is the victim of false police affidavits, he would be raising a claim to which the Illinois point system is equally vulnerable. If a police officer or bureaucrat is willing deliberately to commit perjury, the citizen's ultimate recourse must be under various state and federal tort and criminal statutes. In 999 cases out of 1,000 I cannot see what there will ever be to try concerning the fact of refusal to take a chemical or blood test. 438 F. Supp. 1157, 1163-1164.

For clearly visible and curable errors, the existing "same day" hearing of M.G.L. c. 90, § 24(1)(g), at the time of license surrender continues to be available. For the more difficult questions of fact, or law-and-fact, the post-suspension *de novo* hearing before the Board of Appeal under M.G.L. c. 90, § 28, is appropriate. Consequently, the informal nonevidentiary hearing opportunity proposed by the appellant and by the majority below will not improve upon present procedure and is "unlikely to have significant value in reducing the number of erroneous deprivations." *Dixon* v. *Love*, 431 U.S. 105, 114. The record in this case contains no indication of an unusual degree of error in the present process. Cf. *Mathews* v. *Eldridge*, 424 U.S. 319, 346-347 (1976) (consideration of the reversal rate of appealed cases). The existing procedures will be reliable and fair in the vast majority of cases and therefore satisfy due process. *Id.*, 344.

C. *The Massachusetts Implied Consent Procedure Serves the Deterrence, Punishment and Rehabilitation of Unsafe Drivers and the Efficiency of its Courts and Motor Vehicle Registry.*

Implied consent laws serve the obvious purpose of highway safety. This Court has given special respect to "the important public interest in safety on the roads and highways, and in the prompt removal of a safety hazard." *Dixon* v. *Love*, 431 U.S. 105, 114. More particularly, this purpose "fully distinguishes *Bell* v. *Burson*, . . . where the 'only purpose' of the Georgia statute there under consideration was 'to obtain security from which to pay any judgments against the licensee resulting from the accident.'" *Id.* It has cited the need "to keep off the roads those drivers who are unable or unwilling to respect traffic rules and the

safety of others" as ample justification for an initial summary decision. *Id.*, 114-115.

The same public purpose inheres particularly in the treatment of drunken drivers. Authoritative national estimates have held drinking drivers responsible for as much as 50 per cent of all traffic deaths and accidents.[37] A federal study has indicated that fatal accidents result not so much from "social drinking," but rather from the conduct of chronic "problem drinkers."[38]

The Massachusetts experience for the period 1972 through 1975 shows a substantial increase in the percentage of alcohol related fatalities (A. 70):

Year	Total Fatalities	Alcohol Related Fatalities	Percentage of Alcohol Related Fatalities
1972	991	204	20.6%
1973	1,010	254	25.1%
1974	961	313	32.6%
1975	884	283	32.0%

Over that four-year span, alcohol related deaths rose by 38.7 per cent (A. 68, 70). In the view of the Acting Registrar in 1977, an employee of that agency for 31 years, the mandatory license suspension for refusal of the breathalyzer test constituted the most effective measure available for treatment of drunken driving (A. 69).

In response to the problem, Massachusetts has developed the system of punitive and rehabilitative sanctions described

[37] See generally, The United States Department of Transportation, *1968 Alcohol and Highway Safety Project.*

[38] United States Department of Transportation, *The Alcohol Safety Countermeasures Program* (Pamphlet) 2 (1971).

in Part I, *supra*. The tripwire for that entire scheme is the identification and conviction of the intoxicated driver, and especially the repeatedly intoxicated driver. The evidentiary role of the chemical test is crucial. The prospect of a prompt suspension, unavoidable through a prior-hearing regime, motivates the driver to submit to the breathalyzer test. The test yields objective and usually conclusive evidence on the charge of intoxicated driving. The objectivity of the evidence is doubly valuable: it promotes the identification of the guilty, and the exculpation of the innocent.[39] For the new offender, the evidence will lead to conviction and a one-year revocation of license or to probation and enrollment in a driver alcohol education program or alcohol treatment program. For the repeated offender, the evidence will lead to conviction and the five-year revocation of his license. Public awareness of the implied consent system may deter drunken driving. For, before he begins an intoxicated trip, a typical Massachusetts motorist, and especially a past offender, knows that detection presents hard choices: refusal of the test and the automatic 90-day suspension and possible subsequent conviction in any event; or acceptance of the test and of conclusive evidence leading to punishment or conviction, and the loss of grace accorded the first-time offender. All these benefits of highway safety — accurate evidence, license revocation, driver rehabilitation, and general deterrence — turn on the driver's inability to parry and temporize against the 90-day suspension through the medium of an automatic prior-hearing system.

[39] The dissenting judge below found it hard to imagine that a sober driver would refuse to take the test. 438 F. Supp. 1157, 1163. Montrym illustrates the point. He subsequently claimed in state court proceedings that the denial of his late request to take the test deprived him of the chance to exculpate himself (A. 37).

The majority of the district court questioned the importance of the implied consent process to highway safety in one particular. It reasoned that because a driver could temporarily preserve his license and presence on the road by submission to the test, however incriminating, the process did not urgently remove the dangerous driver for the sake of public safety. 429 F. Supp. 393, 397.[40] It doubted the government's claim of emergency as justification for a subsequent, rather than prior, hearing.

In this case the state relies upon the implied consent sanction not as a narrow emergency measure for instantaneous removal of the intoxicated driver from the road, but as a mechanism to advance a variety of deterrent, punitive, and rehabilitative measures. The sole treatment of the intoxicated driver, especially the first offender, need not be his immediate banishment from the highway. The existence of the implied consent process may still deter drunken driving; the reasonably prompt trial of drivers failing the test and having a prior record will bring the revocation of their licenses; and the probation and education of first-time offenders can both reform them and move them one considerable step closer to revocation. The government need not employ revocation in a rigidly juggernaut fashion in order to justify the refusal of a prior hearing.

[40] See also *Stone* v. *Kentucky Dept. of Transportation*, 379 F. Supp. 652, (E.D. Ky. 1974); *Chavez* v. *Campbell*, 397 F. Supp. 1285, 1287 (D. Ariz. 1973); *Holland* v. *Parker*, 354 F. Supp. 196, 202 (D.S.D., C.D. 1973).

Each of those district courts, in reliance upon *Fuentes* v. *Shevin*, 407 U.S. 67, 90-92 (1972), adopted the view that the government could omit a prior hearing only in emergency situations. *Bell* v. *Burson*, 402 U.S. 535, 542, also suggested that rule for the treatment of the driver's license. Since those decisions, the holdings of *Mathews* and *Dixon* have supplied a different and controlling rationale for the requirement of a prior hearing.

In addition to such positive objectives, the state may fairly rely upon freedom from fiscal and administrative burdens as permitted by the present suspension system. A number of efficiencies accruing to the government from the present law would most certainly disappear with the introduction of a compulsory prior hearing system. In this regard, the Court's response to the prior hearing claim in *Dixon* v. *Love*, 431 U.S. 105, 114, is once again apt:

> Finally, the substantial public interest in administrative efficiency would be impeded by the availability of a pretermination hearing in every case. Giving licensees the choice thus automatically to obtain a delay in the effectiveness of a suspension or revocation would encourage drivers routinely to request full administrative hearings.

A prior hearing system, even nonevidentiary, would inflict an enormous administrative burden upon the Registry. Drivers facing suspension would typically employ it. The number of drivers willing to decline the breathalyzer will tend to grow with the awareness of that option. In fiscal 1976 the Massachusetts local courts processed 17,735 charges of operating under the influence of intoxicating liquor.[41] This figure had risen from 16,290 in fiscal 1975[42] and from 12,861 in fiscal 1974.[43] By contrast, the incremental fact-

[41] Administrative Office of the Massachusetts District Courts, *Statistics for the District Courts of Massachusetts for the Year Ending June 30, 1976.*

[42] Administrative Office of the Massachusetts District Courts, *Statistics for the District Courts of Massachusetts for the Year Ending June 30, 1975.*

[43] Administrative Office of the Massachusetts District Courts, *Statistics for the District Courts of Massachusetts for the Year Ending June 30, 1974.*

finding value of a nonevidentiary hearing will be small. Nonetheless, additional Registry hearing officers will be necessary to conduct the hearings. From drivers bent on the preservation of their licenses, those officers will confront leniency pleas, delays, persuasion, and factual claims requiring full-blown evidentiary hearings.

In the courts, to the extent that more drivers resist the test in reliance upon a prior hearing, its conclusive evidentiary value will be lost. Trials will become more frequent and will consume more time and police testimony in lieu of the test results. The number of guilty pleas will decline. The caseload of the local courts will mount.

An appreciable improvement of such a nonevidentiary prior hearing system upon the present "same day" hearing opportunity is unlikely. Its proposed benefits simply do not justify its considerable administrative burdens, let alone its detriment to the positive goal of highway safety.

Conclusion.

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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Appendix A.

Mass. Gen. Laws, c. 90, § 24(1)(a) [definition and punishment of the offense of driving under the influence of intoxicating liquor]:

> Whoever, upon any way or in any place to which the public has a right of access, or upon any way or in any place to which members of the public have access as invitees or licensees, operates a motor vehicle while under the influence of intoxicating liquor, or of marihuana, narcotic drugs, depressants or stimulant substances, all as defined in section one of chapter ninety-four C, or the vapors of glue, shall be punished by a fine of not less than thirty-five nor more than one thousand dollars, or by imprisonment for not less than two weeks nor more than two years, or both such fine and imprisonment. A court or magistrate, before imposing sentence upon a person found guilty of a violation of this paragraph shall ascertain by inquiry of the office of the registrar or of the board of probation, or of both said offices, what records or other information said office has tending to show that said person has been convicted of a like offense by a court or magistrate of the commonwealth within a period of six years immediately preceding the commission of the offense with which he is charged.

Appendix B.

Mass. Gen. Laws c. 90, § 24(1)(b) [automatic revocation of driver's license for conviction of driving under the influence of intoxicating liquor]:

> A conviction of a violation of the preceding paragraph of this section shall be reported forthwith by the court or magistrate to the registrar, who shall revoke immediately the license or the right to operate of the person so convicted, and no appeal, motion for new trial or exceptions shall operate to stay the revocation of the license or right to operate.

Appendix C.

Mass. Gen. Laws c. 90, § 24(1)(c) [duration of license revocation for conviction of driving under the influence of intoxicating liquor]:

> The registrar, after having revoked the license or the right to operate of any person under the preceding paragraph of this section, shall not issue a new license or reinstate the right to operate to such person, except in his discretion if the prosecution of such person has terminated in favor of the defendant, until five years after the date of revocation following a conviction of a violation of paragraph (*a*) hereof committed within six years after conviction of a violation of said paragraph, nor until one year after the date of revocation following a conviction of any violation of said paragraph other than one committed within six years as aforesaid, except as provided in section twenty-four D; but notwithstanding the foregoing, no new license shall be issued or right to operate be reinstated by the registrar to any person convicted of a violation of paragraph (*a*) of subdivision (1) of this section until ten years after the date of conviction in case the registrar determines upon investigation and after hearing that the action of the person so convicted in committing such offence caused an accident resulting in the death of another, nor at any time after a subsequent conviction of such an offence, whenever committed, in case the registrar determines in the manner aforesaid that the action of such person, in committing the offence of which he was so subsequently convicted, caused an accident resulting in the death of another.

Appendix D.

Mass. Gen. Laws c. 90, § 24(1)(e) [evidentiary value of breathalyzer test results]:

> In any prosecution for a violation of paragraph (1) (*a*) of this section, evidence of the percentage, by weight, of alcohol in the defendant's blood at the time of the alleged offense, as shown by chemical test or analysis of his blood or as indicated by chemical test or analysis of his breath, shall be admissible and deemed relevant to the determination of the question of whether such defendant was at such time under the influence of intoxicating liquor; provided, however, that if such test or analysis was made by or at the direction of a police officer, it was made with the consent of the defendant, the results thereof were made available to him upon his request, and the defendant was afforded a reasonable opportunity, at his request and at his expense, to have another such test or analysis made by a person or physician selected by him. Evidence that the defendant failed or refused to consent to such test or analysis shall not be admissible against him in any civil or criminal proceeding, but shall be admissible in any action by the registrar under paragraph (*f*). Blood shall not be withdrawn from any such defendant for the purposes of any such test or analysis except by a physician or a registered nurse. If such evidence is that such percentage was five one hundredths or less, there shall be a presumption that such defendant was not under the influence of intoxicating liquor, and he shall be released from custody forthwith, but the officer who placed him under arrest shall not

> be liable for false arrest, if such police officer had reasonable grounds to believe that the person arrested had been operating a motor vehicle upon any such way or place while under the influence of intoxicating liquor; if such evidence is that such percentage was more than five one hundredths but less than ten one hundredths, there shall be no presumption; and if such evidence is that such percentage was ten one hundredths or more, there shall be a presumption that such defendant was under the influence of intoxicating liquor. A certificate by a chemist of the department of public safety of the result of an analysis made by him of the percentage of alcohol in blood furnished him in accordance with the provisions of this paragraph by a police officer of any department, signed and sworn to by such chemist, shall be prima facie evidence of the percentage of alcohol in such blood.

Appendix E.

Mass. Gen. Laws c. 90, § 24D [probation of persons convicted of driving under the influence; driver alcohol education program; alcohol treatment and rehabilitation program]:

> Any person convicted of or charged with operating a motor vehicle while under the influence of intoxicating liquor may, if he consents, be placed on probation for one year and shall, as a condition of probation, be assigned to a driver alcohol education program as provided herein and, if deemed necessary by the court, to an alcohol treatment or rehabilitation program or to both as provided herein. Such order of probation shall be in addition to any penalties imposed as provided in paragraph (*a*) of subdivision (1) of section twenty-four and shall be in addition to any requirement imposed as a condition for any suspension of sentence.
>
> In order to qualify for disposition under this section, said person shall cooperate in an investigation conducted by the probation staff of the court for the supervision of cases of operating under the influence of intoxicating liquor in such manner as the commissioner of probation shall determine. After a conviction or any other finding, the case shall be continued for fourteen days for disposition, at which time a report shall be made to the judge.
>
> Said report shall be uniform in content and format throughout the commonwealth and shall include but shall not be limited to a copy of said person's driving record and other records obtained from the registrar, or other person designated by him, pertaining to said person's operation of a motor vehicle as well as any recommendation by the registrar as to whether said person should later be elibible for early reinstatement of his license. The court shall report the disposition or finding of any such case to the registrar. Following disposition, the probation officer supervising a person pursuant to the provisions of this section shall maintain a written and current report which shall include but shall not be limited to consideration of said person's participation in any program in which he has been placed as a condition of probation as well as to a consideration of his drinking and driving behavior.
>
> Driver alcohol education programs utilized under the provisions of this section shall be established and administered by the director of the division of alcoholism in consultation with the registrar and the secretary of public safety, and shall include but shall not be limited to instruction on driver improvement skills as part of the course content.
>
> Alcohol treatment, rehabilitation program or alcohol treatment and rehabilitation programs utilized under the provisions of this section shall include any public or private out-patient clinic, hospital, employer or union-sponsored program, self-help group, or any other organization, facility, service or program which the division of alcoholism has accepted as appropriate for the purposes of this section. The division shall prepare and publish annually a list of all such accepted alcohol treatment, rehabilitation programs and alcohol treatment and rehabilitation programs, shall make this list available upon request to members of the public, and shall from time to time furnish each court in the com-

monwealth, the registrar, and the secretary of public safety with a current copy of said list.

A fee of two hundred dollars shall be paid to the chief probation officer of each court by each person placed in a program of driver alcohol education and, if deemed necessary by the court, a program of alcohol treatment, rehabilitation, or alcohol treatment and rehabilitation pursuant to this section, and beginning December first, nineteen hundred and seventy-five all such fees shall be deposited with the state treasurer to be kept in a separate fund in the treasury for expenditure by the division of alcoholism subject to appropriation for the support of said program, provided further that from the fees received an amount not in excess of three hundred thousand dollars may be expended in fiscal year nineteen hundred and seventy-six without further appropriation. Until such date, the program fees which are paid to the chief probation officer of each court under this section shall be used in the determination of a court under contract or agreement with a public or private agency or facility or person to purchase the services of such agency, facility, or person for a program of driver alcohol education and alcohol treatment, rehabilitation pursuant to this section. No person may be excluded from said program for inability to pay the stated fee, provided that such person files an affidavit of indigency or inability to pay with the court within ten days of the date of disposition, that investigation by the probation officer confirms such indigency or establishes that the payment of such fee would cause a grave and serious hardship to such individual or to the family of such individual, and that the court enters a written finding thereof. Any facility or organization with a treatment or rehabilitation program or a treatment and rehabilitation program used hereunder shall be sub-

rogated to any public or private third-party payments which may be due for the cost of alcohol treatment, rehabilitation, or both.

The state treasurer may accept for the state for the purpose of driver alcohol education, treatment, or rehabilitation any gift or bequest of money or property and any grant, loan, service, payment of property from a governmental authority. Any such money received shall be deposited in the separate fund in the treasury for expenditure by the division of alcoholism subject to appropriation for the support of said driver alcohol education or alcohol treatment or rehabilitation programs in accordance with the conditions of the gift, grant, or loan without specific appropriation. Any federal legislation generating funds for driver alcohol education or treatment or rehabilitation shall be used by the division of alcoholism to the extent possible to support the purposes of this act.

The commissioner of probation shall report in writing at least once annually to the director of the division of alcoholism on the total number of persons who have received disposition hereunder and on the number of such persons who have been determined by the court to require alcohol treatment or rehabilitation, or both. Said commissioner and the chief justices of the district courts and the Boston municipal court shall make further written report at least once annually to said director on the resources available for alcohol treatment or rehabilitation, or alcohol treatment and rehabilitation, of alcohol-impaired drivers, which report shall evaluate the existing resources and shall make recommendation as to additional necessary resources. Said director shall take such reports into consideration in the development, implementation, and review of the

state's alcoholism plan and in the preparation of the division annual budget in a manner consistent with the Alcoholism Treatment and Rehabilitation Law.

Appendix F.

Mass. Gen. Laws c. 90, § 24E [early reinstatement of license for persons convicted of driving under the influence and placed on probation]:

> The provisions of section 24D and this section shall apply to persons convicted or charged with operating a motor vehicle while under the influence of intoxicating liquor. The provisions of this section shall not apply where notice from the registrar of intention to suspend or revoke a person's license or right to operate is pending prior to the date of complaint on the offense before the court nor to cases, where under paragraph (*c*) of subdivision (1) of section twenty-four, the violation is determined to have caused a death.
>
> In order to qualify for a disposition under this section such person shall, in the judgment of the court, have cooperated fully with the investigation as described in section twenty-four D and shall be and have been in full compliance with such order as the court may have made for a one year term of probation as provided therein, including participation in such driver alcohol education programs, alcohol treatment or alcohol treatment and rehabilitation programs as the court may have ordered.
>
> Nothing in this section shall be construed to prevent the exercise by a court of its authority under law to make any other disposition of a case of operating under the influence of intoxicating liquor.
>
> Where a person has been charged with operating a motor vehicle under the influence of intoxicating liquor, and where the case has been continued without a finding and such person has been placed on proba-

tion with his consent and where such person is qualified for disposition under this section, a hearing shall be held by the court at any time after sixty days but not later than ninety days from the date where the case has been continued without a finding to review such person's compliance with the program ordered as a condition of probation and to determine whether dismissal of the charge is warranted.

At said hearing the probation officer shall submit to the court a written report which shall include but shall not be limited to a written statement by the supervisor of any program of alcohol education and of any program of alcohol treatment, rehabilitation, or alcohol treatment and rehabilitation to which the court has assigned such person. Said statement shall consider such person's participation and attendance in each such court ordered program. The registrar shall submit a written report to the judge at said hearing regarding any entries made on said person's driving record in the period following placement in the program. If the judge finds sufficient basis to conclude that said person has satisfactorily completed or is satisfactorily complying with said program the judge may enter a dismissal of the charge. Appropriate orders relative to said person's participation in a program or relative to a later hearing may be made by the court at its hearing, subject to the duration of the one year term of probation.

The probation officer supervising a person pursuant to the provisions of this section shall make a written report to the court if such person has failed to satisfactorily comply with a court ordered program or if such person's operation of a motor vehicle constitutes a threat to the public safety. Upon receipt of such

report the court shall forthwith hold a hearing on the matter. If at such hearing the court shall determine that said person has failed to satisfactorily comply with said program or that said operation of a motor vehicle constitutes such a threat, the court shall forthwith notify the registrar of said finding and the registrar shall forthwith and without further hearing revoke said person's license or right to operate. Such revocation shall be for the remainder of the one year period from the date of revocation provided in paragraph (*c*) of subdivision (1) of section twenty-four. Said person shall thereafter be subject to the same conditions for issuance of a new license or right to operate as any person applying for a new license or right to operate following revocation as provided in paragraph (*c*) of subdivision (1) of section twenty-four.

Where an order of probation has been revoked by the court, the court shall forthwith so notify the registrar in writing and the registrar shall forthwith revoke said person's operators license or right to operate which was restored under this section and without further hearing.